

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DIANA THOMAS,

Grievant,

v.

Docket No. 2015-0280-LogED

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

DISMISSAL ORDER

Grievant, Diana Thomas, filed a level one grievance against her employer, Respondent, Logan County Board of Education, on September 9, 2014, stating as follows: "18A-4-8g Seniority for service personnel. Date of hire December 9, 2011. Signed a waiver that was verbally agreed to be in effect for 1 year on December 20, 2011. January 3, 2012 grievant submitted a letter to personnel rescinding said waiver to take effect December 9, 2012 as agreed. As of September 1, 2014 still still (sic) being "bumped" and struck from the seniority list." As relief sought, Grievant requests "[t]o regain my seniority effective December 21, 2012 to which the waiver I signed became no longer valid. As verbally agreed by both parties."

A level one hearing was conducted on September 29, 2014. The grievance was denied by decision dated October 20, 2014. Grievant appealed to level two on November 12, 2014. Respondent submitted a Motion to Request Denial of Grievant's Request for Level Two Mediation on or about November 14, 2014, alleging that Grievant's level two appeal was untimely filed. Respondent served the same upon Grievant and her representative. By letter dated November 20, 2014, the Grievance Board gave Grievant until December 8, 2014, to respond to the same. However,

Grievant filed no response. Despite this, the Grievance Board allowed the matter to be mediated, and Chief Administrative Law Judge William B. McGinley conducted the same on February 5, 2015; however, the defense of timeliness was not waived. Further, Chief ALJ McGinley informed the parties that the undersigned would issue a ruling on the outstanding timeliness motion. Given the circumstances, the undersigned is treating Respondent's motion as a Motion to Dismiss. It is noted that Grievant appealed to level three on February 27, 2015; however, the level three appeal form was dated February 25, 2015. Respondent appears by counsel, Shana L. O'Briant Thompson, Esq., Partain Law Office, and Grievant appears by David Sayre, Amalgamated Transit Union Local 1742. However, on her level three filing, Patrick Maroney, Esq., is listed as counsel for Grievant. This matter is now mature for consideration.

Synopsis

Grievant filed her appeal to level two more than ten business days after the issuance of the level one decision. Accordingly, Grievant's level two appeal was untimely filed. Therefore, this grievance should be dismissed.

The undersigned makes the following Findings of Fact based upon a review of the record of this grievance:

Findings of Fact

1. Grievant filed this grievance at level one on September 9, 2014.
2. A level one hearing was conducted on September 29, 2014. The grievance was denied by decision dated October 20, 2014.
3. Grievant appealed to level two on November 12, 2014.

4. Grievant filed her appeal to level two more than ten business days after receipt of the level one decision, and she has offered no excuse for this late filing.

Discussion

“Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq.*” Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 6.2 (2008).

Timeliness is an affirmative defense. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *See, Higginbotham v. W. Va. Dep’t of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep’t*, Docket No. 95-MCHD-435 (Dec. 29, 1995); *aff’d, Circuit Court of Mason County*, No. 96-C-02 (June 17, 1996); *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

The Public Employees Grievance Board is an administrative agency, established by the Legislature, to allow a public employee and his or her employer to reach solutions to problems which arise within the scope of their employment relationship. *See generally*, W. Va. Code §§ 6C-2-1 *et seq.* There are established and recognized

constraints for filing and pursuing a grievance in accordance with the West Virginia grievance statutes and applicable regulations. To be considered timely, and, therefore, within the jurisdiction of the Grievance Procedure, a grievance must be timely filed within the time limits set forth in the grievance statute. If proven, an untimely filing will defeat a grievance and the merits of the grievance to be addressed. *See Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997), *aff'd*, *Circuit Court of Kanawha County*, No. 97-AA-110 (Jan. 21, 1999). If the respondent meets the burden of proving the grievance is not timely, the grievant may attempt to demonstrate that he should be excused from filing within the statutory time lines. *See Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997).

West Virginia Code § 6C-2-3(a)(1) requires an employee to “file a grievance within the time limits specified in this article.” *Id.* Further, West Virginia Code § 6C-2-4(b)(1) sets forth the time limits for appealing a grievance from level one, stating as follows: “[w]ithin ten days of receiving an adverse written decision at level one, the grievant shall file a written request for mediation” *Id.* West Virginia Code § 6C-2-2(c) defines “days” as meaning “working days exclusive of Saturday, Sunday, official holidays and any day in which the employee’s workplace is legally closed under the authority of the chief administrator due to weather or other cause provided by statute, rule, policy, or practice.” *Id.*

Grievant failed to file her appeal to level two within the statutory ten-day time limit. Grievant has not asserted that she should be excused from filing within the statutory time lines. Further, the undersigned cannot find any proper basis for excusing Grievant’s untimely filing. Therefore, this grievance is dismissed.

The following Conclusions of Law support the dismissal of this grievance:

Conclusions of Law

1. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *See, Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995); *aff'd, Circuit Court of Mason County*, No. 96-C-02 (June 17, 1996); *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

2. Grievant failed to timely appeal to level two of the grievance process. As such, the grievance is untimely filed, and Grievant has offered no proper basis to excuse her late filing.

Accordingly, this Grievance is **DISMISSED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See W. VA. CODE § 6C-2-5*. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by *W. VA. CODE § 29A-5-4(b)* to serve a copy

of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: March 13, 2015.

Carrie H. LeFevre
Administrative Law Judge